No. 87-1959

Supreme Court, U.S.
FILED
JUL 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILLIPS PETROLEUM COMPANY,
AMOCO PRODUCTION COMPANY and
CITIES SERVICE OIL AND GAS CORP.,
Petitioners,

v.

OLIVER S. BROWN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

ARTHUR R. MILLER
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138
617-495-4111

STEPHEN F. GATES
MARY S. HASKINS
AMOCO PRODUCTION CO.
1670 Broadway
P.O. Box 800
Denver, Colorado 80201
303-830-4681

RICHARD S. HITE
STEVEN D. GOUGH *
KAHRS, NELSON, FANNING,
HITE & KELLOGG
200 West Douglas, Suite 630
Wichita, Kansas 67202
316-265-7761

Attorneys for Amoco Production Company

JOHN L. WILLIFORD
DON L. JEMISON
PHILLIPS PETROLEUM
COMPANY
1262 Adams Building
Bartlesville, Oklahoma 74004
918-661-4743

JOSEPH W. KENNEDY
ROBERT W. COYKENDALL
MORRIS, LAING, EVANS, BROCK
& KENNEDY, Chartered
Fourth Floor, 200 West Douglas
Wichita, Kansas 67202
316-262-2671

Attorneys for Phillips Petroleum Company

GRAYDON D. LUTHEY
CITIES SERVICE OIL AND
GAS CORPORATION
P.O. Box 300
Tulsa, Oklahoma 74102

CRAIG A. COULTER
JOHN A. RAYLL, JR.
COULTER & RAYLL
1602 South Main Street
Tulsa, Oklahoma 74119
918-585-8800

Attorneys for Cities Service Oil and Gas Corporation

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

Page

I. There is a Clear Division Among the Circuits as to the Propriety of a Percentage Attorney Fee Award 1

II. Respondents' Reliance Upon *Brewer v. Southern Union Company* is Misplaced 2

III. The Percentage Method Results in A Virtually Unreviewable Award 3

CONCLUSION 5

TABLE OF AUTHORITIES

Cases:

In re Agent Orange Product Liability Litigation, 818 F.2d 216 (2d Cir.), cert. denied, —— U.S. ——, 108 S.Ct. 289 (1987) 2

In re Agent Orange Product Liability Litigation, 818 F.2d 226 (2d Cir.), cert. denied, —— U.S. ——, 108 S. Ct. 289 (1987) 2

Blum v. Stenson, 465 U.S. 886 (1984) 2

Brewer v. Southern Union Co., 607 F. Supp. 1511 (D. Colo. 1984) 2

City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974) 2

Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10th Cir. 1971) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1959

PHILLIPS PETROLEUM COMPANY,
AMOCO PRODUCTION COMPANY and
CITIES SERVICE OIL AND GAS CORP.,
Petitioners,

v.

OLIVER S. BROWN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF FOR PETITIONERS [1]

I. There Is A Clear Division Among The Circuits As To The Propriety Of A Percentage Attorney Fee Award.

The Tenth Circuit's decision below clearly departs from the fee methodology employed previously by other circuits in common fund cases. The decision is irreconcilable with the Second, Third and Eighth Circuits' decisions rejecting the percentage method for determining fee awards. The respondents' position that these other circuits will avoid a conflict by now overruling their own well established precedents for arriving at attorney fee awards in

---

[1] Petitioners' listing of Parties is set forth on the Petition at p. ii, and in the petition appendix at pp. 44a-46a.

common fund cases is presumptuous. More importantly, it emphasizes that uncertainty and conflict among the federal courts will continue until this Court exercises its supervisory power.

In *In Re Agent Orange Product Liability Litigation*, 818 F.2d 216 (2d Cir. 1987), a common fund case, the Second Circuit reaffirmed its commitment to the lodestar formula for calculating attorney fee awards. In that decision, the court stated that "[a]dherence to these [lodestar] principles is essential not only to avoid awarding windfall fees to counsel, but also to 'avoid every appearance of having done so,' . . . ." 818 F.2d at 222, *citing*, *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2d Cir. 1974). *See also*, *In Re Agent Orange Product Liability Litigation*, 818 F.2d 226, 232 (2d Cir. 1987) ("In order to provide counsel with [fair and just] compensation, and, at the same time, render these awards to prevent windfalls, we have adopted a lodestar formula for calculating fees in equitable fund and statutory fee contexts."). While perhaps reading *Blum v. Stenson*, 465 U.S. 886 (1984), as allowing courts greater freedom to adjust a lodestar in a common fund case, 818 F.2d at 234, it certainly did not waiver from its position on the lodestar.

The clear division between the Second and the Tenth Circuits will only widen if the decision below is left to stand. Certiorari should be granted.

II. Respondents' Reliance Upon *Brewer v. Southern Union Company* Is Misplaced.

Respondents support the award below by citation to an unreviewed decision of a district court. This reliance is ironic because the court in *Brewer v. Southern Union Co.*, 607 F. Supp. 1511 (D. Colo. 1984), made its award not by choosing a percentage, but instead by performing a lodestar calculation.

The differences between these cases supports the position of the petitioners that the award below is excessive and unreasonable. The funds in these two cases were approximately the same size. Hours spent, however, differed markedly. Approximately 18,000 hours were claimed to be spent in this action, while over 22,000 hours of attorney time were expended in *Brewer*. In addition, 17,865 hours of paralegal/clerk time and 6,019 hours of research consultant time were expended in *Brewer*. No similar expenditure of paralegal/clerk or research consultant time exists in this case.

More importantly, the award of 14 percent of the fund in *Brewer included* interim payments. The award in the present case is *in addition to* the sums counsel charged their clients as the case progressed. The respondents' brief cannot and does not justify one of the respondent counsel, who billed a client and received $200 for an hour of work in 1984, receiving from class members several times that amount for that same hour of work.[2]

III. The Percentage Method Results In A Virtually Unreviewable Award.

Merely picking a percentage of a fund to award as attorney fee results in an award that is virtually unreviewable. Labeling a percentage as "reasonable" allows a court to avoid deciding questions concerning the hours to compensate,[3] the hourly rates that would yield a reasonable

---

[2] At the conclusion of the evidentiary hearing, the judge made "off the cuff" findings of appropriate multipliers. He stated that a multiplier of 2.5 was appropriate for lead counsel, and that other counsel deserved lower or no multipliers. These multipliers are below the corresponding multipliers found in *Brewer*.

[3] In its application in this case, lead counsel requested the award of attorney fees include compensation for 2,300 hours of work counsel performed for its client Ashland in an Oklahoma case Ashland brought on its own behalf against Phillips. Compensating this time was opposed by petitioners. Whether the district court com-

award, and whether to adjust a fee to reflect risk [4] or other factors.[5]

If controversies can exist as to hours, rates, and other *Johnson* factors, the resulting award cannot appropriately reflect those factors. The result is a truly irrational award.

---

pensated lead counsel for it remains a mystery. The Tenth Circuit's decision approving a percentage award did not dispell the mystery. This is the reason that "claimed hours" are either approximately 18,000 as indicated in the petition, or 20,798 as claimed in the response.

[4] The risk borne by counsel of nonpayment of any attorney fees has not been identified. While lead counsel asserts that it billed only "minimal amounts from time to time, which would reimburse the law firm for office overhead," counsel also indicates that amount was at rates up to $200 per hour. See Response, pp. 3, 4. Certainly, any risk was diminished or disappeared after liability was settled by the Tenth Circuit in 1971. See *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 (10th Cir. 1971).

[5] The statement that Cities "allowed class counsel to do all the work" is incorrect. Respondents admitted that they expressly excluded Cities from participation, and that Cities nonetheless continued to participate on its own behalf through its own counsel. R. Vol. Eight, Transcript of Hearing, March 6, 1985, pp. 186-187.

CONCLUSION

The questions presented in this petition represent real and important conflicts among courts. The Court should grant certiorari to resolve these conflicts.

Respectfully submitted,

ARTHUR R. MILLER
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138
617-495-4111

STEPHEN F. GATES
MARY S. HASKINS
AMOCO PRODUCTION CO.
1670 Broadway
P.O. Box 800
Denver, Colorado 80201
303-830-4681

RICHARD S. HITE
STEVEN D. GOUGH *
KAHRS, NELSON, FANNING, HITE & KELLOGG
200 West Douglas, Suite 630
Wichita, Kansas 67202
316-265-7761

Attorneys for Amoco Production Company

JOHN L. WILLIFORD
DON L. JEMISON
PHILLIPS PETROLEUM COMPANY
1262 Adams Building
Bartlesville, Oklahoma 74004
918-661-4743

JOSEPH W. KENNEDY
ROBERT W. COYKENDALL
MORRIS, LAING, EVANS, BROCK & KENNEDY, Chartered
Fourth Floor, 200 West Douglas
Wichita, Kansas 67202
316-262-2671

Attorneys for Phillips Petroleum Company

GRAYDON D. LUTHEY
CITIES SERVICE OIL AND GAS CORPORATION
P.O. Box 300
Tulsa, Oklahoma 74102

CRAIG A. COULTER
JOHN A. RAYLL, JR.
COULTER & RAYLL
1602 South Main Street
Tulsa, Oklahoma 74119
918-585-8800

Attorneys for Cities Service Oil and Gas Corporation

* Counsel of Record